

Memorandum

To : COMMISSIONERS
Delta Protection Commission
-and-
INTERESTED PERSONS

Date : September 13, 1993

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From : RICHARD M. FRANK
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Subject: Revised, Proposed Regulations Governing Delta Protection
Commission's Appellate Jurisdiction

At its August 26, 1993 meeting, the Delta Protection Commission held a hearing on proposed regulations to establish procedures by which the Commission would process, consider and resolve administrative appeals from local government decisions which are brought before the Commission. (See Pub. Resources Code § 29770-29772.) Following the close of the hearing, the Commission asked its staff to redraft several sections of the proposed regulations, make the revisions available for public review, and return to the Commission at its scheduled September 30, 1993 in order that the Commission could consider adopting the proposed regulations.

Attached is a copy of the proposed regulations, revised by staff per the direction of the Commission at the August 26th hearing. Pursuant to Government Code section 11346.8(c), these revisions have been made available for public review and comment for a 15-day period prior to the upcoming, September 30th meeting at which the regulations will be considered for final adoption. A copy of the notice advising the public of the availability of the revised, proposed regulations is also attached.

Set forth below is a summary of the more significant changes which are reflected in the attached, revised draft of the proposed regulations:

- § 2 The time period for filing an administrative appeal has been reduced from 30 to 10 calendar days. A definition of the term "final action" has been added to make clear that no administrative appeal may be filed before a final decision is made by the affected local government.
- § 3 Former subsections (e) and (f), which would have required the appealing party to identify potentially-interested persons, have been deleted.

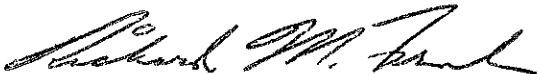
- § 4 Per the commissioners' request, the statutory grounds for an appeal of a local governmental action have been explicitly identified.
- § 6 This section has been rewritten to make it the responsibility of the Commission's executive director to obtain information relevant to the appeal from the affected local government. (The prior version would have required the local government to physically transfer the pertinent file(s) to the Commission.) Also, new language has been added confirming that the names and addresses of potentially-interested third parties should be obtained by Commission staff from the local government. (This information, required by the Commission to fulfill certain due process requirements, was previously to be furnished by the appellant.)
- § 9 The deadline for the Commission's determination of the first phase of the 2-step appeal (i.e., whether an "appealable issue" exists at all) has been reduced from 60 to 45 days in an effort to minimize delay. Language has also been added confirming that any written staff report regarding such an appeal is a public document and shall be made available at least five days before the hearing.
- § 11 Two new provisions have been added to facilitate public participation in the appeals process. The first confirms that any interested person--not just the appellant and the affected local government--may testify before the Commission regarding an appeal. The second provides similar, explicit authorization for such persons to file written comments with the Commission at or before the hearing on the appeal.
- § 14 Language has been added to clarify that the requirements regarding disclosure of ex parte contacts applies to contacts commissioners receive from the parties to the appeal as well as third persons.

Your executive director and this office believe that the attached, proposed revisions accurately reflect the changes which the Commission asked be made to these regulations. However, two additional issues were raised at the August 26th hearing which the Commission may wish to consider before voting on the proposed regulations:

Should a fee be charged to those who file administrative appeals with the Commission? This is a policy decision which we understand will be discussed by the Commission's budget and finance subcommittee before the Commission's September 30th meeting. The subcommittee will presumably report its views on this question to the full Commission at that time.

Should section 14, dealing with ex parte contacts, be deleted?
This office has previously alerted the Commission to the legal principles governing ex parte communications received by commissioners in connection with their deliberations on administrative appeals and similar "quasi-judicial" decisions.^{1/} In our view, proposed section 14 accurately reflects the applicable legal requirements. However, some participants at the August 26th hearing have proposed that section 14 be deleted. This, again, is a policy judgment for the Commission to make. However, the legal restrictions on ex parte contacts would remain and have to be respected by the Commission whether or not section 14 is deleted.

If commissioners or others have questions about the proposed revisions or the draft regulations generally, I would be happy to address them at the September 30th meeting.


RICHARD M. FRANK
Supervising Deputy Attorney General

cc: Margit Aramburu
Executive Director
Delta Protection Commission (w/attachs.)

1. "Quasi-judicial" decisions are those which involve the application of general principles or policy to a particular factual setting. The Commission's administrative appeals jurisdiction constitutes the exercise of such quasi-judicial authority. It must be contrasted with "quasi-legislative" decisions--such as the Commission's adoption of a regional management plan--which involve the setting of broad policy or general standards. Existing law provides more stringent limitations on ex parte communications regarding quasi-judicial decisions than it does concerning quasi-legislative matters.

NOTICE OF AVAILABILITY

REVISED, PROPOSED REGULATIONS OF THE DELTA PROTECTION COMMISSION ADMINISTRATIVE APPEALS FROM LOCAL GOVERNMENT DECISIONS

At its August 26, 1993 meeting, the Delta Protection Commission held a hearing on proposed regulations to establish procedures by which the Commission would process, consider and resolve administrative appeals from local government decisions which are brought before the Commission. (See Pub. Resources Code § 29770-29772.) Following the conclusion of the hearing, the Commission asked its staff to redraft several sections of the proposed regulations, make the revisions available for public review, and return to the Commission at its scheduled September 30, 1993 to consider adoption of the proposed regulations.

Attached are:

- 1) A copy of the proposed regulations, as revised to reflect modifications suggested by members of the public and commissioners in the course of the August 26th hearing; and
- 2) A September 13, 1993 memorandum from the Commission's counsel summarizing the more significant revisions.

Additional copies of these materials are available for public inspection and comment during normal business hours at:

Delta Protection Commission
14219 River Road
P.O. Box 530
Walnut Grove, Ca. 95690
(916) 776-2290

Attn: Margit Aramburu, Executive Director

The Commission will consider adoption of these regulations at its next regularly-scheduled meeting. That meeting is scheduled as follows:

Thursday, September 30, 1993
6:30 p.m.
Jean Harvie Community Center
14273 River Road
Walnut Grove, Ca. 95690

Any written comments received by the Commission at the above address on or before September 30, 1993 will be considered by the Commission and its staff prior to final consideration of the proposed regulations.

--September 13, 1993

(PROPOSED) REGULATIONS
DELTA PROTECTION COMMISSION
(as revised 9/8/93)

§ 1 Purpose

These regulations establish the procedures by which the Delta Protection Commission processes, considers and resolves appeals from local governmental decisions which are brought before the Commission under the provisions of Public Resources Code §§ 29770-29772.

§ 2 Time for Appeal

A person aggrieved by any action taken by a local government which falls within the criteria established in Public Resources Code § 29970(a) may file an appeal with the Commission within 30 10 calendar days of the date on which the pertinent local government has taken final action concerning the matter being appealed. For purposes of this section, "final action" means a decision of the local government that is final and not subject to any further review by any member or decision-making body of that local government.

§ 3 Contents and Filing of Appeal

An appeal brought under these regulations shall be in writing and shall contain at least the following information:

- a) the name and address of the appellant;
- b) the name and address of the third party, if any, whose proposal is the subject of the appeal and the local government action being appealed;
- c) a description of the proposal or development that is the subject of the local government action being appealed;
- d) the identity of the local governmental body whose action is being appealed;
- ~~e) the names and addresses of all persons who submitted written comments or who spoke and left his or her name at any public hearing regarding the local government action being appealed;~~
- ~~f) the names and addresses of all other persons known by the appellant to have an interest in the matter on appeal;~~
- g) the specific ground(s) for appeal; and

Note: Additions to originally-proposed text are underlined (underlined); deletions are interdelineated (~~interdelineated~~).

hf) a detailed statement of facts on which the appeal is based.

The appeal shall be considered "filed" with the Commission when the original letter from the appellant is received, determined by staff to contain all of the information listed above, and stamped "Filed" by the Commission with the date of filing indicated.

§ 4 Grounds for Appeal

The grounds for appeal of a local government action shall be limited to those specified in Public Resources Code § 29770(a), i.e., that such action is inconsistent with the Commission's Resource Management Plan, those portions of a local government's general plan that implement the Resource Management Plan, or the Delta Protection Act.

§5 Commission Procedures Upon Receipt of Appeal

Within ~~three~~ five working days of receipt of an appeal, the executive director of the Commission shall:

- a) post a notice and brief description of the appeal in a conspicuous location in the Commission office;
- b) mail to the affected local government a copy of the same notice and brief description, together with a copy of the appeal document(s) filed with the Commission;
- c) mail to the affected third party, if any, identified in § 3(b) above a copy of the notice and brief description, together with a copy of the appeal document(s) filed with the Commission; and
- d) mail copies of the notice and brief description to each member of the Commission.

§6 Effect of Appeal

Upon receipt of a timely appeal, the executive director shall notify the affected local government and the third party, if any, identified in § 3(b) above that the operation and effect of the local government's action has been stayed pending Commission action on the appeal as required by Public Resources Code § 29771. Upon receipt of an appeal, the executive director shall request ~~from that~~ that the affected local agency make available for inspection and copying prompt delivery of all relevant documents and materials used by the local government in its consideration of the action being appealed. This information shall include the names and addresses of all persons who submitted written comments or testified before the local government regarding the matter being appealed. If the Commission fails to ~~receive~~ obtain access

to the documents and materials on a timely basis, the Commission shall commence a hearing on the appeal as provided in § 9, below, but shall leave the hearing open until all such relevant documents and materials are received and reviewed by the Commission.

§ 7 De Novo Review

The Commission shall conduct a de novo review of the local government action being reviewed.

§ 8 Standard of Review

The standard of Commission review of any appealable local government action shall be whether that action meets the requirements of Public Resources Code § 29770(a).

§ 9 Determination of Commission Jurisdiction/Appealable Issue

a) The Commission's appellate review shall be conducted in two sequential phases. At the first available Commission meeting following ~~receipt~~ filing of an appeal, but in no event more than ~~60~~ 45 days thereafter, the Commission shall determine by majority vote whether the appeal:

i) raises issues not within the Commission's jurisdiction;
or

ii) does not raise an appealable issue.

b) If the Commission finds either that the appeal raises issues outside the Commission's jurisdiction or that it fails to raise an appealable issue, the Commission shall dismiss the appeal. That dismissal constitutes final Commission action from which judicial review may be taken under Public Resources Code § 29772.

c) The Commission shall make the determination set forth in subsection (a) only after Commission staff has presented a recommendation, orally or in writing, on the questions presented. Any written staff recommendation is a public record which shall be made available for public inspection at least five working days prior to the hearing.

§ 10 Hearing on Merits of Appeal

Unless the Commission dismisses the appeal for the reasons set forth above, the Commission shall proceed to hear the appeal on its merits at the Commission's next available, regularly-scheduled meeting.

§11 Evidence and Hearing Procedures

a) Hearings conducted by the Commission under these regulations shall be conducted in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay..

b) Hearings need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding. Unduly repetitious or irrelevant evidence shall be excluded upon order of the Commission or its chairperson.

c) Evidence before the Commission includes, but is not limited to, the record before the local government whose action is being appealed. Except in unusual circumstances, the record will not include a transcript of the local government proceedings unless provided by a party to the proceedings.

d) Any interested person may testify before the Commission regarding an appeal. Speakers' presentations shall be to the point and shall be as brief as possible. Visual and other materials may be used as appropriate. The Commission may establish reasonable time limits for presentation(s); such time limits shall be made known to all affected persons prior to any hearing. Where speakers use or submit to the Commission visual or other materials, such materials shall become part of the hearing record and shall be identified and maintained as such. Speakers may substitute reproductions of models or other large materials but shall agree to make the originals available upon request of the executive director.

e) Commissioners may ask questions of the appellant, the affected local government's representative(s), any affected third party(s) appearing at the hearing, staff or the Commission's legal counsel. Questioning of speakers at the hearing by other persons shall not be permitted except by permission of the Chairperson.

f) Interested persons may submit written comments concerning an appeal. Any such comments will be considered by the Commission if they are received by the Commission at or before the hearing on the appeal.

§ 12 Commission Decision on Merits of Appeal

a) The Commission's determination on the merits of an appeal brought under Public Resources Code § 29770 shall be by majority vote.

b) The Commission's decision shall be deemed final upon the taking of the vote, unless the Commission directs that written findings be prepared for consideration by the Commission on a subsequent date. If such findings are prepared, the Commission action shall be deemed final upon the date the findings are adopted by the Commission.

c) Written Commission findings, if any, shall be prepared by staff and presented to the Commission for consideration at the next regularly-scheduled meeting following the Commission's vote on the merits of the appeal. The time for preparation of findings may be extended by the Chair in appropriate circumstances.

§ 13 Notification of Commission Action

The Commission shall notify the local government, the appellant and the affected third party, if any, identified in § 3(b) of each formal action taking by the Commission under §§ 9 and 10. The notification shall be transmitted by the Executive Director within ten working days of the Commission's formal action.

§ 14 Ex Parte Contacts

a) Decisions of the Commission on appeals heard under Public Resources Code § 29770 shall be based strictly on the evidence presented during the public hearing. The Commission shall not rely upon any communications, reports, staff memoranda, or other materials prepared in connection with a particular appeal unless those materials are made a part of the hearing record.

b) If commissioners receive written or oral communications from any person ~~third parties~~ concerning a pending appeal outside the formal hearing process, they shall disclose, on the record and prior to a Commission vote on the appeal, both the existence and substance of the communications.

Authority cited for each of the above regulations: Public Resources Code § 29770(b).

Reference for each of the above regulations: Public Resources Code § 29770-29772.